Supreme Court, U.S.
FILED
06-1097 FEB 06 2007
OFFICE OF THE CLERK

No. ____

In The Supreme Court of the United States

PENG LI,

Petitioner,

v.

US DEPARTMENT OF JUSTICE,
Executive Office for Immigration Review,
Board of Immigration Appeals,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

Whether the petitioner's denial of an asylum request involves both questions of law and fact?

Whether the petitioner's denial of an asylum request violated her Constitutional Rights?

STATEMENT PURSUANT TO RULE 29.6

Petitioner does not own any share in any publicly held company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT 4

ARGUMENT 5

I. The Court erred in denying petitioner's petition for review. The BIA's denial of petitioner's asylum request involves questions of law and fact 5

II. The Court erred in denying petitioner's petition for review. The BIA's denial of petitioner's asylum request involves Constitutional Violations 6

CONCLUSION.....7

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Aguilera v. Kirkpatrick,
241 F.3d 1286 (10th Cir. 2001).....6

Balogun v. U.S. Attorney General,
-F.3d-, WLO 2333840 (11th Cir. 2005).....7

Luis v. I.N.S.,
196 F.3d 36 (1st Cir. 1999).....7

Constitutional Provisions

U.S. CONST. amend. V.....2, 5, 6, 7

U.S. CONST. art. III.....2, 5, 6, 7

U.S. CONST. art. VI.....2, 5, 6, 7

Statutes

8 U.S.C. § 1158(a)(2)(B).....2, 5, 6

8 U.S.C. § 1158(a)(2)(D).....2, 5, 6, 7

8 U.S.C. § 1252(a)(2)(D).....2, 4

8 U.S.C. § 1252(a)(9).....2, 4, 5

8 U.S.C. § 1252(a)(f)(2).....*passim*

28 U.S.C. § 1254(1).....1

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Immigration Judge's opinion denying petitioner's claim for asylum, withholding of removal to China and protection under the Convention Against Torture. (App. 9) The Board of Immigration Appeal's decision summarily affirming the Immigration Judge's decision without opinion. (App. 4) United States Court of Appeals for the Second Circuit's opinion denying the Petition for Review. (App. 1) The United States Court of Appeal for the Second Circuit denied the following Petition for Rehearing and suggestion for *En Banc* hearing. (App. 20)

STATEMENT OF JURISDICTION

The Court of Appeals entered its amended opinion and order on November 9th, 2006, after denying Petition for Rehearing *En Banc*. Petitioners invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The provision of the Immigration and Nationality Act 8 U.S.C. Section 1158(a)(2)(B), 8 U.S.C. Section 1158(a)(2)(D), 8 U.S.C. Section 1252(a)(2)(D), 8 U.S.C. Section 1252(a)(9), 8 U.S.C. Section 1252(a)(f)(2), 5th Amendment of the United States Constitution, Article III of the United Stated Constitution granting asylum relief, Article VI of the United States Constitution involving treaty rights, and Article 33 of the U.N. Protocol.

STATEMENT OF THE CASE

Respondent is a native of the People's Republic of China. In accordance with China's family planning policy, she was forced to sign a document stating that she and her husband would not have any more children after the birth of her daughter. She was allowed to use any type of contraceptive to make sure she did not get pregnant again. Between 1984 and 1985, respondent was forced to have 3 abortions for violating this one child family planning policy. The first abortion occurred in early 1984 after she had learned that she was four months pregnant. Upon learning of her pregnancy, the family planning officer at her workplace immediately had her taken to a hospital where she was forced to endure the pain and agony of a midterm abortion. After this occurrence, Chinese officials allowed her to use oral contraceptives in order to prevent future pregnancy. In her workplace she was humiliated and ridiculed for getting pregnant again. A freedom that we see as fundamental and private in our society brought her

condemnation in her workplace. Adding insult to injury, her conceiving a child was the cause of a reduction in her bonus and pay.

In the following year and a half, respondent was forced to have two more abortions with the third leading the officials to insert an IUD in her body that would prevent her from conceiving any more children. At work she was humiliated even further. She was forced to make speeches in front of her coworkers where she condemned her own actions and she was used as an example in employee booklets. Furthermore, although she was assigned more responsibility in her job, she was no longer given any bonus for her work efforts.

In 1998, after finally saving enough money to leave China, respondent obtained an L2 visa from the United States Embassy in order to come to the United Sates. She knowingly used false documents to obtain the visa and paid approximately $12.000. USD – Since then, she has worked at a Nail Salon and has struggled to make it in this country. She has taken on a therapist to finally help her deal with the deep psychological trauma and depression that has prevented her from living a normal life for many years.

On June 23, 2003, Immigration Judge Sandy K. Hom issued a ruling finding petitioner removable to China – denying petitioner's claim for asylum and withholding of removal as relied on under the Convention Against Torture Act. (App. 9) On July 17, 2003, petitioner filed a timely notice of appeal to the BIA. On September 9, 2004, the BIA issued an

order granting the withholding of removal, but dismissing the appeal for asylum. (App. 4) On October 7, 2004, petitioner filed a timely petition for review on the BIA's decision regarding asylum with the United Stated Court of Appeals for the Second Circuit. On August 9, 2006, the Second Circuit denied petitioner's appeal for asylum. (App. 1) On November 8, 2006, the Second Circuit denied petitioner's Petition for Rehearing *En Banc*. (App. 20)

This Petition for a Writ of Certiorari followed.

REASON FOR GRANTING THE WRIT

In accordance with 8 U.S.C. Section 1252(a)(2)(D), the United States Appeals Court for the Second Circuit retains jurisdiction to review constitutional claims and "questions of law". The proceedings in this case involved both a question of fact and a question of law. The Court denied the petitioner's petition for review because the Court felt that the issue of extraordinary circumstance in filing an untimely application for asylum was a "question of fact" – and not within the scope of its jurisdiction.

8 U.S.C. Section 1252(a)(9) allows the Court judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States. Further, 8 U.S.C. Section 1252(a)(f)(2) states that "not withstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under

this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law."

By ignoring the valid extraordinary circumstances presented by petitioner excusing the timeliness of an asylum application under 8 U.S.C. Section 1158(a)(2)(D), the BIA ignored the clear and convincing evidence presented by petitioner, which is prohibited by law under aforementioned 8 U.S.C. 1252(a)(f)(2). Furthermore, by ignoring clear and convincing evidence of a valid extraordinary circumstance, the BIA violated petitioner's due process rights under the 5th Amendment, Article III granting asylum relief, and Article VI treaty rights of the U.S. Constitution.

ARGUMENT

I. The Court erred in denying petitioner's petition for review. The BIA's denial of petitioner's asylum request involves questions of law and fact

Upon judicial review, 8 U.S.C. Section 1252(a)(9) allows the Court to consolidate questions of law and fact. In the present case, when the BIA denied the petitioner's valid claim of an extraordinary circumstance for the filing of an asylum application under 8 U.S.C. Section 1158(a)(2)(B), a question of law arose concerning the BIA's ruling. 8 U.S.C. Section 1252(a)(f)(2) allows the Court judicial review if there exists "clear and convincing" evidence that entry or execution of an order is prohibited by law. When the BIA denied

petitioner's right under Section 1158(a)(2)(B), it ignored petitioner's rights under aforementioned Section 1158. By doing so, the Court has the power to review the BIA's ruling under 8 U.S.C. Section 1252(a)(f)(2), because the BIA's ruling was prohibited by law, as exhibited by clear and convincing evidence. (See Joint Appendix and Petitioner's petition for review.)

II. The Court erred in denying petitioner's petition for review. The BIA's denial of petitioner's asylum request involves Constitutional Violations

Under Article III of the U.S. Constitution, individuals may be granted asylum relief. Article VI of the U.S. Constitution respects treaty rights, including Article 33 of the U.N. Protocol. Finally, the 5th Amendment of the U.S. Constitution grants individual equal protection and due process rights. When the BIA ignored the "clear and convincing" evidence presented, as allowed under 8 U.S.C. Section 1158(a)(2)(D), the BIA violated petitioner's Constitutional rights. The ruling of the BIA is prohibited by 8 U.S.C. Section 1252(a)(f)(2), whereby denying petitioner her due process rights accorded under the 5th Amendment. Further, the BIA's ruling was in violation of Article III and Article VI, which grants petitioner the right to asylum as dictated by governing law. The BIA's finding was erroneous, and petitioner should be afforded the asylum relief granted under Article III, as well as her treaty rights under Article VI. In *Aguilera v. Kirkpatrick,* 241 F.3d 1286, 1291 (10th Cir. 2001), the found that the Attorney General cannot act unconstitutionally.

(See also *Pena Luis*, 196 F.3d 36 (1st Cir. 1999) and *Balogun v. U.S. Attorney Genera*l, -F.3d-, WLO 2333840, at 2-5 (11th Cir. 2005)).

CONCLUSION

Petitioner respectfully requests that the Petition for the Writ of Certiorari be granted. The question before the court involves one of fact and law, and questions of constitutionality. The BIA's decision was not respectful of the "clear and convincing evidence" presented by petitioner regarding extraordinary circumstance and the timeliness of an asylum application under 8 U.S.C. Section 1158(a)(2)(D); disregarding petitioner's rights under Section 1158(a)(2)(D) is prohibited by law under Section 1252(a)(f)(2), and a violation of her Constitutional rights under Article III, Article VI, and the 5th Amendment. Henceforth, the Court has the power of judicial review in the present case, and the BIA's decision should be reversed and the request for asylum should be granted.

Respectfully Submitted,

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